

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

## BACKGROUND

1 and his sentence of 26 years to life, in Los Angeles County  
2 Superior Court<sup>1</sup> (Case No. BA057246). The Petition alleges the  
3 following grounds for federal habeas relief: (1) Petitioner  
4 suffers from an illegitimate and authorized sentence because he  
5 should have been convicted of only second degree murder; (2)  
6 Petitioner received ineffective assistance of trial counsel; (3)  
7 There was instructional error in several respects, including the  
8 trial court's failure to instruct the jury sua sponte with CALJIC  
9 No. 2.71.7; and (4) There was cumulative instructional error.  
10 (Petition at 2, 6; Petition Memorandum at 7-11, 16-21<sup>2</sup>).

11  
12 On March 28, 2012, Petitioner filed a Petition for Writ of  
13 Habeas Corpus pursuant to 28 U.S.C. § 2254 in which he challenged  
14 the same 2001 conviction. See James Maloy v. T. Verga, Case No.  
15 CV 12-02688-CAS (CW); Docket Entry No. 1 ("the prior habeas  
16 action"). On February 26, 2013, the Court issued an Order and  
17 Judgment denying that habeas petition with prejudice as time-  
18 barred, in accordance with the findings and recommendation of the  
19 Magistrate Judge. (Id.; Docket Entry Nos. 28-29). On February  
20 26, 2013, the Court denied a certificate of appealability. (Id.;  
21 Docket Entry No. 30).

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24 <sup>1</sup> On September 30, 1993, a Los Angeles Superior Court  
25 jury convicted Petitioner of one count of first degree murder and  
26 found true the allegation that a principal was armed with a  
27 firearm in the commission of the offense. On October 21, 2013,  
28 Petitioner was sentenced to prison to a total of 26 years to  
life. (See James Maloy v. T. Verga, Case No. CV 12-02688-CAS  
(CW); Docket No. 26 at 2).

<sup>2</sup> The Court refers to Petitioner's page-numbering system  
in citing to the Petition and Petition Memorandum.

**DISCUSSION**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted on April 24, 1996, provides in pertinent part that:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in §2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

1 (C) The court of appeals may authorize the filing  
2 of a second or successive application only if it  
3 determines that the application makes a prima facie  
showing that the application satisfies the requirements  
of this subsection.

4 (D) The court of appeals shall grant or deny the  
5 authorization to file a second or successive application  
not later than 30 days after the filing of the motion.

6 (E) The grant or denial of an authorization by a  
7 court of appeals to file a second or successive  
8 application shall not be appealable and shall not be the  
subject of a Petition for Rehearing or for a Writ of  
Certiorari.

9 (4) A district court shall dismiss any claim  
10 presented in a second or successive application that the  
11 court of appeals has authorized to be filed unless the  
applicant shows that the claim satisfies the  
requirements of this section. 28 U.S.C. § 2244.

12 28 U.S.C. § 2244(b) (3) "creates a 'gatekeeping' mechanism for  
13 the consideration of second or successive applications in district  
14 court. The prospective applicant must file in the court of  
15 appeals a motion for leave to file a second or successive habeas  
16 application in the district court. § 2244(b) (3) (A)." Felker v.  
17 Turpin, 518 U.S. 651, 657 (1996).  
18

19 The instant Petition and the prior habeas action both  
20 challenge Petitioner's custody pursuant to the same 1993 judgment  
21 entered by the Los Angeles County Superior Court. Accordingly,  
22 the instant Petition, filed on March 21, 2016, well after the  
23 effective date of the AEDPA, is a second or successive habeas  
24 petition for purposes of 28 U.S.C. § 2244. Therefore, Petitioner  
25 was required to obtain authorization from the Court of Appeals  
26 before filing the present Petition. See 28 U.S.C. §2244(b) (3) (A).  
27 No such authorization has been obtained in this case.  
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1       Moreover, the claims asserted in the instant Petition do not  
2 appear to fall within the exceptions to the bar on second or  
3 successive petitions because the asserted claims are not based on  
4 newly discovered facts or a "a new rule of constitutional law,  
5 made retroactive to cases on collateral review by the Supreme  
6 Court, that was previously unavailable." Tyler v. Cain, 533 U.S.  
7 656, 662 (2001).<sup>3</sup> However, this determination must be made by  
8 the United States Court of Appeals upon a petitioner's motion for  
9 an order authorizing the district court to consider his second or  
10 successive petition. 28 U.S.C. § 2244(b); see also Burton v.  
11 Stewart, 549 U.S. 147, 157 (2007) (where the petitioner did not  
12 receive authorization from the Court of Appeals before filing  
13 second or successive petition, "the District Court was without  
14 jurisdiction to entertain [the petition]"); Barapind v. Reno, 225  
15 F.3d 1100, 1111 (9th Cir. 2000) ("[T]he prior-appellate-review  
16 mechanism set forth in § 2244(b) requires the permission of the  
17 court of appeals before 'a second or successive habeas application  
18 under § 2254' may be commenced."). Because Petitioner has not  
19 obtained authorization from the Ninth Circuit Court of Appeals,  
20 this Court cannot entertain the present Petition. See Burton v.  
21 Stewart, supra.

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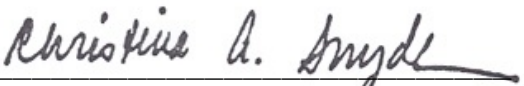
27       <sup>3</sup> The case Petitioner relies on -- People v. Chiu, 59  
28 Cal.4th 155 (2014) (see Petition at 6-7; Petition Memorandum at  
7, 10, 12, 17, 20-21) -- is a California Supreme Court case.

ORDER

Accordingly, IT IS ORDERED that the Petition be dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 22, 2016

  
CHRISTINA A. SNYDER  
UNITED STATES DISTRICT JUDGE